

Original filed 3/23/07

1
2
3
4
5
6
7
8 NOT FOR CITATION

9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11
12 MARIO K. BENNETT,) No. C 05-3502 JF (PR)
13 Plaintiff,) ORDER DENYING
14) PLAINTIFF'S MOTIONS FOR
15 vs.) APPOINTMENT OF
16 JEANNE WOODFORD, et al.,) COUNSEL; DENYING
17 Defendants.) MOTIONS TO ATTACH
18) EVIDENCE; ORDER OF
19) DISMISSAL WITH LEAVE
20) TO AMEND
21) (Docket Nos. 15, 22, 30, 33, 37,
22) 39)

23 Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint pursuant
24 to 42 U.S.C. § 1983 against Pelican Bay State Prison (“PBSP”) officials and the Director
25 of the California Department of Corrections and Rehabilitation. Plaintiff filed an
26 amended complaint, which contains supporting documentation of his prison
27 administrative appeal, but no claims or allegations against Defendants. Therefore, the
28 Court will review Plaintiff’s claims in his original complaint. Plaintiff has filed three
motions for appointment of counsel, two motions to attach evidence and a motion to
attach legal mail. The Court will DENY Plaintiff’s motions for appointment of counsel
(docket nos. 15, 22, 39) without prejudice. The Court will DENY Plaintiff’s motions to

Order Denying Plaintiff’s Motions for Appointment of Counsel; Denying Motions to Attach Evidence; Order of
Dismissal with Leave to Amend

P:\pro-se\sj.jf\cr.05\Bennett502dwltamisc

1 attach evidence and legal mail (docket nos. 30, 33, 37) and dismiss the original complaint
 2 and the amended complaint with leave to amend. Plaintiff may include supporting
 3 documentation of any exhibits with his second amended complaint.

4 **BACKGROUND**

5 Plaintiff alleges that PBSP employees searched his cell and asked him if he knew
 6 an individual named Karen Diane Figgins. They told Plaintiff not to write to Ms. Figgins,
 7 and he replied that he did not write to her. Defendants did not show Plaintiff any letters,
 8 or proof, that he had written to Ms. Figgins. Several days later, Plaintiff was told that he
 9 was being placed on mail monitoring status and that Defendant Lieutenant Wood would
 10 review Plaintiff's outgoing mail. Plaintiff alleges that his mail is delayed because he has
 11 not received any mail in three weeks and that his family has not received his outgoing
 12 mail. Plaintiff names the following Defendants in his complaint: PBSP Warden Kirkland,
 13 PBSP Captain Patten, PBSP Lieutenant Wood, PBSP Correctional Officer Haley, and
 14 Director of Corrections and Rehabilitation Jeanne Woodford. Plaintiff seeks the
 15 following relief: injunctive relief in firing the PBSP Defendants and money damages for
 16 pain and suffering in the amount of \$5 million dollars.

17 **DISCUSSION**

18 **A. The Merits**

19 **1. Standard of Review**

20 Federal courts must engage in a preliminary screening of cases in which prisoners
 21 seek redress from a governmental entity or officer or employee of a governmental entity.
 22 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and
 23 dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief
 24 may be granted, or seek monetary relief from a defendant who is immune from such
 25 relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. Balistreri v.
Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

26 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that a person
 27
 28

1 acting under the color of state law committed a violation of a right secured by the
 2 Constitution or laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988).

3 Liability may be imposed on an individual defendant under section 1983 if the
 4 plaintiff can show that the defendant proximately caused the deprivation of a federally
 5 protected right. See Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988); Harris v. City of
 6 Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives another of a
 7 constitutional right within the meaning of section 1983 if he does an affirmative act,
 8 participates in another's affirmative act or omits to perform an act which he is legally
 9 required to do, that causes the deprivation of which the plaintiff complains. See Leer, 844
 10 F.2d at 633; Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995).

11 2. Plaintiff's Claim

12 Plaintiff alleges that Defendants have placed him on mail monitoring, without
 13 justification, resulting in the delay of his outgoing and incoming mail.

14 Prisoners enjoy a First Amendment right to send and receive mail. See Witherow
 15 v. Paff, 52 F.3d 264, 265 (9th Cir. 1995) (citing Thornburgh v. Abbott, 490 U.S. 401, 407
 16 (1989)). A prison, however, may adopt regulations or practices which impinge on a
 17 prisoner's First Amendment rights as long as the regulations are "reasonably related to
 18 legitimate penological interests." See Turner v. Safley, 482 U.S. 78, 89 (1987). The
 19 Turner standard applies to regulations and practices concerning all correspondence
 20 between prisoners and to regulations concerning incoming mail received by prisoners
 21 from non-prisoners. See Thornburgh, 490 U.S. at 413. In the case of outgoing
 22 correspondence from prisoners to non-prisoners, however, an exception to the Turner
 23 standard applies. Because outgoing correspondence from prisoners does not, by its very
 24 nature, pose a serious threat to internal prison order and security, there must be a closer fit
 25 between any regulation or practice affecting such correspondence and the purpose it
 26 purports to serve. See id. at 411-12. Censorship in such instances is justified only if
 27 (1) the regulation or practice in question furthers one or more of the substantial
 28

1 governmental interests of security, order and rehabilitation, and (2) the limitation on First
 2 Amendment freedoms is no greater than necessary to further the particular government
 3 interest involved. See Procunier v. Martinez, 416 U.S. 396, 413 (1974), overruled on
 4 other grounds, Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1989); see, e.g., Witherow,
 5 52 F.3d at 265-66 (regulation requiring visual inspection of outgoing mail from inmates
 6 to certain public officials closely related to legitimate penological interest of preventing
 7 prisoners from disseminating harmful or offensive materials and avoids unnecessary
 8 intrusion) (emphasis added).

9 Plaintiff claims that his outgoing mail was rerouted to Defendant Wood in order to monitor his mail. However, Plaintiff fails to set forth specific facts showing how the remaining Defendants proximately caused a constitutional deprivation. For a claim to be cognizable, a Plaintiff must “set forth specific facts as to each individual defendant’s deprivation of protected rights.” Leer, 844 F.2d at 634. But here, Plaintiff alleges facts without explaining the actions of each Defendant involved. As such, Plaintiff fails to link all named Defendants to his claim. Accordingly, the complaint does not state a cognizable claim against the remaining Defendants Kirkland, Patten, Haley and Woodford. The Court will dismiss the complaint and amended complaint with leave to amend.

19 Plaintiff must allege facts supporting each claim against each individual Defendant separately in his second amended complaint showing his entitlement to relief from each Defendant. Plaintiff should list the constitutional right he has, describe what each Defendant did or failed to do, and describe how each Defendant’s acts or omissions caused him injury. He should not refer to the defendants as a group, i.e., “the defendants;” rather, he should identify each involved Defendant by name and link each of them to a specific claim by explaining what each defendant did or failed to do that caused a violation of his constitutional rights.

27 As to Plaintiff’s claim against PBSP Warden Kirkland and Director of the
 28

1 Department of Corrections and Rehabilitation Jeanne Woodford, Plaintiff is cautioned
 2 that there is no respondeat superior liability under Section 1983, i.e. no liability under the
 3 theory that one is responsible for the actions or omissions of an employee. Liability
 4 under Section 1983 arises only upon a showing of personal participation by the defendant.
 5 Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor may be liable under
 6 section 1983 upon a showing of (1) personal involvement in the constitutional deprivation
 7 or (2) a sufficient causal connection between the supervisor's wrongful conduct and the
 8 constitutional violation. Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir.
 9 1991) (en banc) (citation omitted).

10 Plaintiff will be given leave to amend the complaint to cure this deficiency.
 11 Accordingly, the Court grants Plaintiff leave to file a second amended complaint within
 12 **thirty days** of the date this order is filed to include sufficient facts to support his claim
 13 against each Defendant and the alleged constitutional violation he suffered.

14 **B. Motions for Appointment of Counsel**

15 Plaintiff has filed three motions for appointment of counsel. As stated in the
 16 Court's previous order denying appointment of counsel, there is no constitutional right to
 17 counsel in a civil case. Lassiter v. Dep't of Social Services, 452 U.S. 18, 25 (1981). 28
 18 U.S.C. § 1915 confers on a district court only the power to "request" that counsel
 19 represent a litigant who is proceeding in forma pauperis. 28 U.S.C. § 1915(e)(1). This
 20 does not give the courts the power to make "coercive appointments of counsel." Mallard
 21 v. United States Dist. Court, 490 U.S. 296, 310 (1989).

22 The court may ask counsel to represent an indigent litigant under § 1915 only in
 23 "exceptional circumstances," the determination of which requires an evaluation of both
 24 (1) the likelihood of success on the merits and (2) the ability of the plaintiff to articulate
 25 his claims pro se in light of the complexity of the legal issues involved. See Rand v.
 26 Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997); Terrell v. Brewer, 935 F.2d 1015, 1017
 27 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986). Both of
 28

1 these factors must be viewed together before reaching a decision on a request for counsel
 2 under § 1915. See id. Neither the need for discovery, nor the fact that the pro se litigant
 3 would be better served with the assistance of counsel, necessarily qualify the issues
 4 involved as complex. See Rand, 113 F.3d at 1525 (where plaintiff's pursuit of discovery
 5 was comprehensive and focused and his papers were generally articulate and organized,
 6 district court did not abuse discretion in denying request for counsel).

7 The Court concludes that appointment of counsel is not necessary at this time.
 8 The Court has dismissed Plaintiff's complaint with leave to amend and has yet to review
 9 the merits of Plaintiff's claims in his second amended complaint. Accordingly, Plaintiff's
 10 motions for appointment of counsel (docket nos. 15, 22, 39) are DENIED without
 11 prejudice.

12 **C. Motions to Attach Evidence and Legal Mail**

13 Plaintiff has filed two motions to attach evidence and exhibits, a motion to attach
 14 legal mail and also filed several exhibits in this action. The Court notes that Plaintiff
 15 must include all of his exhibits and attachments with his second amended complaint.
 16 Plaintiff may not send in attachments and documents separately to be included with his
 17 second amended complaint. Accordingly, Plaintiff's motions (docket nos. 30, 33, 37) are
 18 DENIED without prejudice. Plaintiff may include any supporting exhibits or documents
 19 with his second amended complaint as set forth below.

20 **CONCLUSION**

21 1. Plaintiff's motions for appointment of counsel (docket nos. 15, 22, 39) are
 22 DENIED without prejudice.

23 2. Plaintiff's motions to attach evidence and legal mail (docket nos. 30, 33,
 24 37) are DENIED without prejudice.

25 3. Plaintiff's claims against Defendants Kirkland, Patten, Haley and
 26 Woodford are DISMISSED with leave to amend, as indicated above, within **thirty days**
 27 from the date this order is filed. The second amended complaint must include the caption
 28

1 and civil case number used in this order (05-3502 JF (PR)) and the words SECOND
 2 AMENDED COMPLAINT on the first page. Because an amended complaint completely
 3 replaces the original complaint, Plaintiff must include in it all the claims he wishes to
 4 present. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir.), cert. denied, 113 S. Ct.
 5 321 (1992). Plaintiff may not incorporate material from the original complaint or
 6 amended complaint, such as supporting documentation of the prison appeal process, by
 7 reference. Plaintiff must include all of his claims (including the one cognizable claim
 8 against Defendant Wood) and name all Defendants in the amended complaint. **Failure to
 9 file an amended complaint within the designated time will result in the Court
 10 proceeding with the original complaint and the one cognizable claim against
 11 Defendant Wood.**

12 Plaintiff filed a notice with the Court stating that the Defendants no longer are
 13 employed at PBSP. Plaintiff shall provide identifying information for the Defendants
 14 (new address, full name, etc.) in his second amended complaint.

15 4. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
 16 Court informed of any change of address by filing a separate paper with the clerk headed
 17 "Notice of Change of Address." He must comply with the Court's orders in a timely
 18 fashion or ask for an extension of time to do so. Failure to comply may result in the
 19 dismissal of this action pursuant to Federal Rule of Civil Procedure 41(b).

20 IT IS SO ORDERED.

21 DATED: 3/23/07



JEREMY FOGEL
United States District Judge

22
23
24
25
26
27
28

1 A copy of this ruling was mailed to the following:

2 Mario K. Bennett
3 V-23447
4 Pelican Bay State Prison
P.O. Box 7500
5 Crescent City, CA 95531-7500
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28